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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| DEREK HARDY, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 02A03-0605-CR-221 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Marcia Linsky, Magistrate
Cause No. 02D04-0502-CM-108

**April 4, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Derek Hardy ("Hardy") appeals from a jury conviction of Class B misdemeanor criminal recklessness. He raises one issue: whether the trial court abused its discretion when it excluded Hardy's testimony concerning a protective order he had against the victim. Concluding that the trial court did not abuse its discretion, we affirm.

**Facts and Procedural History**

Hardy operates an auto detailing business in Fort Wayne. On February 17, 2005, Gina Ridley ("Ridley"), Hardy's ex-girlfriend, drove into the parking lot of his business and asked him about money he had agreed to give her. Hardy told her that he would not give her the money. As Ridley began to drive off, Hardy ran toward her vehicle with a hammer and told her, "Bitch you better get the [expletive deleted] out of here." Tr. pp. 80, 105. Hardy struck the driver's side window with the hammer, causing it to shatter and cut Ridley's face. Ridley pulled away and drove directly to a police station to report the incident.

A police officer dispatched to Hardy's business questioned him about the incident. Hardy admitted that he threw the hammer at the window and told the officer, "If I knew that I could get away with murder, I'd kill that bitch." Tr. p. 123. Hardy was arrested and charged with Class A misdemeanor domestic battery, Class B misdemeanor criminal recklessness, and Class A misdemeanor battery. A jury trial commenced on March 22, 2006. At trial, Hardy raised self-defense and defense of property and sought to introduce testimony that, prior to the incident, he had obtained a protective order against Ridley. The State objected and the trial court sustained the objection. The jury ultimately

convicted Hardy of Class B misdemeanor criminal recklessness. The trial court sentenced Hardy to 180 days. Hardy now appeals.

**Standard of Review**

We review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. Guillen v. State, 829 N.E.2d 142, 145 (Ind. Ct. App. 2005) (citing Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000)). We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Id. Under Indiana Evidence Rule 103(a), "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

**Discussion and Decision**

Self-defense requires reasonable apprehension of harm by the defendant. Brand v. State, 766 N.E.2d 772, 780 (Ind. Ct. App. 2002), trans. denied (citing Ind. Code § 35-41-3-2). When a defendant claims that he acted in self-defense, evidence legitimately tending to support his theory is admissible. Id. Where a defendant claims self-defense, evidence of specific bad acts is admissible to prove that the victim had a violent character which frightened the defendant. Holder v. State, 571 N.E.2d 1250, 1254 (Ind. 1991). Thus, the victim's reputed character, propensity for violence, prior threats and acts, if known by the defendant, may be relevant to the issue of whether a defendant had fear of the victim prior to using force against them. Brand, 766 N.E.2d at 780. Therefore, a defendant is entitled to support his claim of self-defense by introducing evidence of matters that would make his fear of the victim reasonable. Id.

Hardy contends that the trial court erred in excluding evidence of the victim's prior bad acts to support his claim of self-defense. He sought to introduce testimony regarding a protective order he had obtained against Ridley and argues that such evidence was admissible under Indiana Evidence Rule 404(a) and Rule 405(b). Rule 404(a) governs the admissibility of character evidence and provides:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> * * *
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;…

Evid. R. 404(a) (2007).

Indiana Evidence Rule 405 governs the methods of proving character and provides:

> (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Upon reasonable pre-trial notice by the accused of the intention to offer character evidence, the prosecution in a criminal case shall provide the accused with any relevant specific instances of conduct to be used in cross-examination.
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> (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Evid. R. 405 (2007).

Here, Hardy did not seek to introduce reputation or opinion testimony regarding the victim's character or propensity for violence. Instead, he sought to introduce

testimony of the existence of and circumstances surrounding a protective order issued against Ridley. Evidence of specific incidents is permissible only on cross-examination of a character witness under Rule 405(a), or when character "is an essential element of a charge, claim, or defense" under Rule 405(b). Brooks v. State, 683 N.E.2d 574, 577 (Ind. 1997). Neither situation is presented here. At trial, Hardy indicated that he would testify about the protective order, not that he intended to cross-examine a character or opinion witness. See id. Moreover, the fact that a defendant asserts self-defense does not make the victim's character an essential element of his defense. Guillen v. State, 829 N.E.2d 142, 147 (Ind. Ct. App. 2005) (citing Brooks, 683 N.E.2d at 577).

Therefore, the trial court did not abuse its discretion when it excluded evidence of specific instances of the victim's conduct.

Affirmed.

NAJAM, J., and MAY, J., concur.